

DIRECTOR OF CENTRAL INTELLIGENCE

Security Committee

INVESTIGATIVE STANDARDS WORKING GROUP

SECOM-D-360

2 October 1980

MEMORANDUM FOR: Chairman, Security Committee

STATINTL FROM:
Acting Chairman, Investigative
Standards Working Group

SUBJECT: DCID 1/14 Appeals
(Proposed Annex B)

1. The Investigative Standards Working Group met on 28 August 1980 to consider appeals procedures for individuals in Government and industry whose access to SCI has been denied or revoked. At the outset of our discussions earlier in the year, we agreed to proceed on the basic premise that the Intelligence Community needs a set of commonly applied appeals procedures to prevent further atomism in community practices and to forestall more stringent court-imposed restrictions. At my invitation during the 28 August meeting, Messrs. DCI/OGC, gave a thoroughly comprehensive and cogent presentation of legal considerations which undergird the urgent need for such procedures; afterwards, they participated with the Working Group in a detailed discussion of the matter. STATINTL

2. The Working Group voted to endorse the proposed annex as presented in Attachment A, and to recommend its approval by the Security Committee. Ten members and the Department of Commerce observer voted in favor of the proposal: State, FBI, Treasury, DOE, Justice, SAFSS, CIA, DIA, Air Force and Army. The NSA representative abstained but endorsed submission of the proposal to the Security Committee.

NAVY and OSD review(s) completed.

3. One member of the Working Group requested affirmation that the proposed annex does not require notification to an individual of failure to meet the personnel security standards of DCID 1/14 if security considerations preclude notification in the first place to the individual that he/she were to be investigated to determine SCI eligibility. Such legislative intent was affirmed by the Working Group and is embodied generally in paragraph one and specifically in paragraph 4a of the proposed annex.

4. The OSD and Navy members objected to certain provisions of the proposed annex and voted to recommend disapproval. Their arguments are set forth along the following lines:

a. Paragraphs 4b and 4c - The proposed annex provides appellant the opportunity to appear before the SIO's Determination Authority or his designee only if the Determination Authority decides that issues remain unresolved or additional questions need to be asked. Specific wording in the proposal is based on the Working Group belief that (1) an opportunity for personal appearance is an integral part of due process; (2) the appellant's appearance should be limited to a confrontation of the Determining Authority and his information rather than the sources of such information; (3) the Determination Authority or his designee should have an opportunity to ask additional questions; and (4) Government initiatives will preclude court-imposed requirements which could force confrontation of all witnesses or expunging of confidential information (as in the Jane Doe case). In disagreeing, the OSD and Navy members stated their belief that it is unnecessary, undesirable, and gratuitous to suggest condonation of personal appearances of any kind no matter what the circumstances.

b. Paragraph 4a(1) - Persons shall be notified that their SCI access has been denied or revoked. The Working Group's rationale for notification after the fact is to reinforce paragraph one of the proposed annex which states that SCI access is not an entitlement of any kind whatsoever. In fact, paragraph one states specifically that an individual does not have the opportunity to appeal prior to the actual denial or revocation of SCI access. The OSD member believes an individual should be notified of impending denial or revocation so that the individual has an opportunity to respond prior to such action.

c. Paragraph 4a(2) - Individuals will be provided the basis for denial or revocation of SCI access. The OSD member believes that individuals should automatically be provided with specific reasons for denial or revocation. The Working Group agreed on the word "basis" because it permits a government agency to give an individual the general nature of denial or revocation without having to detail all of the specific reasons. It also provides more flexibility in protecting an individual's privacy.

5. Written responses were provided by the OSD and Navy members and are enclosed as Attachments B and C. The OSD member's response includes a substitute proposal which he would advocate as an amendment to the DCID 1/14 itself rather than the proposed Annex B. His proposed substitute reads as follows:

"Each SIO shall establish formal procedures to ensure that individuals to be denied access to SCI are notified of the impending denial and the reasons therefore, and are afforded a reasonable opportunity to respond prior to denial of such access."

As the Working Group has already voted in favor of more detailed procedures, the OSD substitute has, in effect, been rejected and will not be considered at that level. It should be noted that the OSD proposal is even more general in nature than the original set of appeals procedures endorsed by the Security Committee in 1979 and, in my opinion, would likely result in few common practices amongst Intelligence Community members. On the other hand, the proposed Annex B is specifically intended to establish common due process procedures in DCID 1/14 appeals.

6. The Investigative Standards Working Group has, therefore, authorized me to transmit the following recommendations to you:

a. That the proposed Annex B to DCID 1/14 (Attachment A) be approved by the Security Committee; and

b. that the Security Committee endorsement be transmitted to the NFIB and the DCI for approval and promulgation.

STATINTL

7. I personally recommend that DCI/OGC, be permitted to address the Security Committee in order to clarify legal considerations which have led to the need for this proposal.

STATINTL



Attachments

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WASHINGTON, D. C. 20301

22 SEP 1980

POLICY REVIEW

MEMORANDUM FOR ACTING CHAIRMAN, INVESTIGATIVE STANDARDS WORKING
GROUP (ISWG)

SUBJECT: SCI Appeal Procedures

It is the position of the Office of the Secretary of Defense that Annex B, which proposes specific due process guidelines, is neither necessary nor desirable. We would prefer, as an alternative, an amendment to DCID 1/14 itself which sets forth a more general DCI policy along the following lines:

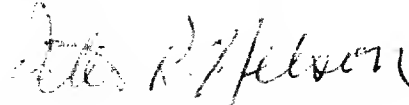
"Each Senior Intelligence Officer shall establish formal procedures to ensure that individuals to be denied access to SCI are notified of the impending denial and the reasons therefor, and are afforded a reasonable opportunity to respond prior to denial of such access."

We believe such a policy issued by the DCI would establish a uniform requirement for basic procedural due process in the intelligence community, while leaving component agencies the flexibility to adopt their own specific procedures to implement the more general policy.

The Department of Defense, has, in fact, adopted its own specific due process procedures which, at present, apply to denials of SCI access, as well as adverse actions taken in the collateral area. These procedures, which do not require all of the procedural steps proposed by Annex B, do, in our judgment, meet the basic standard proposed above without incurring an unacceptable administrative burden on Defense components. Indeed, similar procedures have been in effect in the military departments for over a decade in circumstances where collateral clearances have been denied; not only have they not proved administratively burdensome, they have not provoked legal challenges in terms of their constitutional sufficiency.

We are concerned if the steps proposed in Annex B were adopted, that we would have a difficult time in distinguishing what constitutes "acceptable" due process in the SCI context from what is "acceptable" due process in the non-SCI area. In short, we are concerned that the more rigorous due process procedures required by Annex B might have to be adopted for the collateral area as well, entailing unacceptable administrative costs.

Therefore, it is recommended that the Investigative Standards Working Group reconsider the submission to the DCI Security Committee of the draft Annex B and consider the alternative of placing language such as is recommended above in DCID 1/14.



Peter R. Nelson
OSD Member, ISWG

10 Sep 1980

MEMORANDUM

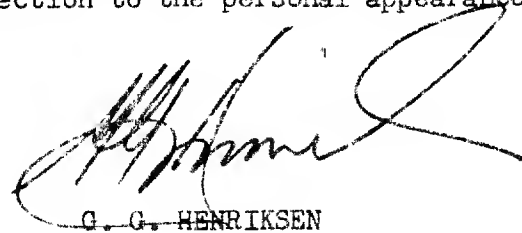
From: G. G. Henriksen, Alternate Navy ISWG Member, Naval Security
Group Headquarters, 3801 Nebraska Avenue, Washington, D.C. 20390
To: DCI SECOM, Director, CIA, Room 3E05, Headquarters Building
Washington, D.C. 20505

STAT Attn: Chairman, Investigative Standards Working Group

Subj: Investigative Standards Working Group meeting of 28 August 1980

1. As requested at subject meeting, the Navy negative vote on the appeals procedures proposal was based on the following: "All references to personal appearance should be deleted. There is no known requirement that due process rights be accorded a person who is denied access to SCI as no property or liberty interest is involved in such a denial. To impose, by regulation, due process elements other than those of notice and the opportunity to be heard in writing would be impractical within the adjudicative process of the Department of the Navy and do little to enhance the viable privileges of an appellant. The Navy's two Determination Authorities are located in the Washington, D.C. area; however, those persons under consideration for access to SCI are generally far removed from the Determination Authority. To require a personal hearing before the Determination Authority would, therefore, be cost ineffective whether the appellant or the Navy were responsible for payment of travel and other expenses incurred by the exercise of the proposed privilege of personal appearance. It is noted, however, that the assistance of counsel in the preparation of an appeal is not precluded by deletion of these subparagraphs. In real, as opposed to abstract, due process privileges those of notice, written hearing, and assistance of counsel are all that are necessary to adequately protect the person concerned and facilitate informed and commonsense decision-making by the entity. Neither individual rights nor the best interests of the national security require the gratuitous privilege of personal appearance in the appeal process. There is no legal objection to the personal appearance but is opposed as a policy."

CC:
Navy Member, SECOM
Navy Member, ISWG



G. G. HENRIKSEN